Supreme Court, U.S.
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In the Supreme Court

of the

United States

OCTOBER TERM, 1994

RUSSELL HAMPSHIRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Whether Petitioner was denied Fifth Amendment Due Process by the circuit's assertion that he waived his sentencing claims by not objecting at time of sentencing when the record shows incorporation of Petitioner's written objections and, a fortiori, the court's presentence ex parte letter to the Attorney General regarding the case manifests the district court's bias?

2. Whether the district court was without jurisdiction under the Sentencing Guidelines to impose a fine for costs of incarceration absent the imposition of a punitive fine in the first instance?

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RUSSELL HAMPSHIRE,

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V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Russell Hampshire, respectfully prays that a Writ of Certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Eleventh Circuit filed February 4, 1994 affirming the judgment of the United States District Court for the Southern District of Alabama which dismissed the indictment against petitioner based upon outrageous prosecutorial misconduct.

OPINIONS BELOW

The citation of the opinion of which review is sought is United States v. Russell Hampshire. Eleventh Circuit, February 4, 1994) (#92-6048). Rehearing with suggestion en banc was denied April 6, 1994.

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1254(1).

The United States Court of Appeals entered its decision upon denial of a petition for rehearing on April 6, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states in part: "No person shall...be deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

On September 19, 1991, a five-count indictment was filed in the United States District Court for the Southern District of Alabama charging Petitioner Hampshire, VCA Labs,

Inc., Nolan Quan and Don Diekmann with violations of 18 U.S.C. §§371, 1462 and 1467 for conspiracy to cause and knowingly causing interstate transportation through use of a common carrier of a number of videotapes alleged to be obscene.

On April 8, 1992, Hampshire and defendant VCA Labs, Inc. entered into a Plea Agreement pursuant to Federal Rule of Criminal Procedure 11(e)(1)(c) that, among other things, called for Hampshire to plead guilty to Counts Two and Three of the Indictment, to cooperate fully with the government and testify before a federal grand jury and upon doing so the government would recommend a sentence of no more than twelve months (although counsel could ask for a lower sentence).

The Plea Agreement further specified, "the parties agree that it is the intent for the cumulative forfeiture amount to be two million dollars with no fine. This agreement shall be

invalid if the agreed terms are not adopted by all the district courts and the parties will be permitted to withdraw all pleas previously entered." CR Vol. 2, Doc. 60.

On April 8, 1992 the Court in chambers took Petitioner Hampshire's guilty plea based on the Plea Agreement. In doing so the court stated, "I want Mr. Hampshire to understand that this agreement is being made under the terms of this plea agreement that will be introduced at this time." CR Vol. 6, at 4. During this proceeding no mention was made of the possibility of a sentence involving supervised release.

Prior to imposing sentence and after being informed that Petitioner Hampshire had rendered substantial assistance to the government, Judge Vollmer advised the parties in camera that he had agreed to be bound by the plea agreement. RE Doc 3 at 3.

Bias on the part of the Court can be inferred from its in camera comments. When

Petitioner's counsel informed the Court that under the plea agreement he would be bringing up in court other factors to seek a period of incarceration of less than twelve months, the Court declared, "Let me say this in chambers so that you're aware of what my retort will be to you." RE Doc. 3 at 4. The Court then proceeded to express its disappointment with the United States' Attorney's office for settling the case, advised that in drug cases he had sentenced someone to "ten years, for being the girlfriend of someone who distributed cocaine," and retorted that his personal feeling was "the production of obscene material is as bad as the production of cocaine" and that he had "a very bad attitude toward it (obscene material)." RE Doc. 3 at 5.

Additional evidence of the Court's bias can be gleaned from its further statement:

> What I'm calling to your attention, sir, is that if you say it outside, I'm going to make some of

these remarks probably. It may be that you can appeal the sentence as a result of these remarks and I'm suggesting you could probably have that right here.

I will accept what the Government has recommended. I will tell all of you that as a matter of fact, I wrote the attorney general a letter concerning the fact that I did this and I was sad that I did it, that I would never do it again. And I will tell Mr. Moore, and I think I may have already told Mr. Moore, that I would never approve a settlement like this again. The reason for it is as I just expressed to you. RE Doc. 3 at 6. (emphasis added.)

Upon resumption of sentencing proceedings in open court, Petitioner's counsel made a brief statement regarding downward departure and then submitted on the basis of the sentencing

pleading. CR Vol. 8, at 30. Thereafter the Court sentenced Petitioner Hampshire to custody for twelve months, the maximum sentence authorized by the Plea Agreement. CR Vol. 8, at 34. The Court also placed Petitioner on supervised release for a period of three years (the maximum allowed) and imposed costs of incarceration and supervision totaling $22,054.80. CR Vol. 8, at 34-36.

After imposing sentence the Court stated that any objections to the sentence should be stated or they would be waived on appeal. However, the Court observed that all previous objections would be renewed. Petitioner objected to the Court not considering reducing the incarceration period below twelve months.

On September 11, 1992, the Honorable Richard Vollmer, Jr. sentenced Petitioner Hampshire to the custody of the Attorney General for a period of twelve months, imposed a three year period of supervised release and ordered

Hampshire to pay $22,054.80 for costs of incarceration.

On September 17, 1992, Hampshire filed a timely notice of appeal. CR Vol. 2, Doc. 74. On February 4, 1994, the Eleventh Circuit affirmed the sentence imposed on the basis that objections thereto had been waived. On April 6, 1994 a petition for rehearing was denied.

SUMMARY OF ARGUMENT

The Circuit's decision refused to recognize or even discuss the fact that the trial judge wrote the Attorney General a letter about the case prior to sentencing Hampshire. It is unquestionable that the very act of writing such a letter reflects bias on the part of the trial court. Moreover, when asked to produce the letter both the Attorney General and the court stonewalled Hampshire. (See, for example, Petitioner's letter of September 28, 1992 to Attorney General Barr which is Exhibit 7 to

Petitioner's Emergency Motion for Bail on Appeal directed to the Eleventh Circuit). Clearly, a conspiracy of silence existed between the district court and the prosecution.

The actions of the district court bear witness to this conspiracy to deprive Hampshire of the benefits of his plea bargain. This the court did by imposing on Petitioner conditions of supervised release and payment of costs of incarceration. Neither of these conditions was mentioned in the Plea Agreement, nor were they discussed at the time the plea was taken by the court.

The court obviously understood the Plea Agreement and its terms, but decided to attempt to get around them. This is despite the fact the court said it would be bound by the Plea Agreement. CR Vol. 7 at 18. With respect to the portion of the sentence imposing a fine on Petitioner Hampshire for costs of incarceration, the court initially stated it was a fine then

tried to hide it by calling it a "cost". CR Vol. 8 at 36. The Court said also "(n)o fine is imposed pursuant to the Plea Agreement which specifies forfeiture in the amount of $2 million by VCA labs". CR Vol. 8 at 37. Thus, the district court knew it could not fine Hampshire under the Plea Agreement and tried to sidestep the issue by denominating the "fine" as a "cost". The court's action thus manifests its bias.

Initially, Petitioner had asked the court to depart from the 12 month recommendation and submitted on what had been submitted before. Then the court considered the matter in chambers and revealed its bias saying "I wrote the Attorney General a letter concerning the fact that I did this, I was sad that I did it, and that I would never do it again." ER Doc. 3 at 6. The court also told Hampshire's counsel "what I'm calling to your attention, sir, is that if you say it outside, I'm going to make

some of these remarks probably. It may be that you can appeal this sentence as a result of these remarks and I'm suggesting you probably have that right here." Id. Obviously, the intent of the court was to intimidate and silence counsel.

Later, back in the courtroom, the court after imposing sentence told counsel for Petitioner "I, of course, will give you all objections that you have made already, Mr. Mayock, but if you have anything further you can make these at this time.

Mr. Mayock: I suppose for the record I should say that I object to the court not considering reducing incarceration to a lesser period than twelve months." CR Vol. 8 at 41. Counsel for Petitioner thus reiterated his earlier statement knowing that the court understood the terms of the Plea Agreement and knowing that his sentencing memorandum contained the limits on which the sentence could be based

as a Rule 11 plea. Clearly, anything counsel said would have been futile at that moment. Petitioner wanted to get whatever benefit he could of the sentence he had bargained for. It is a miscarriage of justice to bar Petitioner from the benefits of his plea agreement because he sought to preserve what little he had received rather than risk losing everything by rightfully accusing the judge of bias and judicial misconduct.

There was no waiver on the part of Petitioner Hampshire by not immediately opposing the sentence. Prior to imposition of sentence Hampshire's counsel asked "that the court depart down from the 12 month recommendation and I submit on what has been submitted before". CR Vol. 8 at 33. After the sentence was later imposed Petitioner preserved his claim since the court specifically stated, "I, of course, will give you all objections that you have made already, Mr. Mayock, but if you have anything

further you can make those at this time." CR Vol. 8 at 45. Since earlier in the proceedings, Petitioner's counsel had referenced his Memorandum of Points and Authorities with respect to Sentencing Factors, the Points contained therein must be deemed to have been made. They are as follows:

"With respect to the Plea Agreement, it is understood that this plea was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(c) and that there is to be no fine for the defendant only a cumulative fine of $2 million for the corporation, VCA Labs, Inc. Moreover, the guidelines are affected by the Plea Agreement since the plea is for a maximum one year term with a downward departure possibly being recommended below that time by the government and with the defense being allowed to ask for an even greater downward departure (See Paragraph 12 of the Plea Agreement). Moreover, the Plea Agreement makes clear that the plea is

null and void if the agreed terms are not adopted by the District Court. (Emphasis added.) Doc. 67 at 7.

Those familiar with the plea agreement could not in good faith twist and contort its meaning to possibly include imposition of a fine or supervised release. Assistant United States Attorney Moore stated at the time of the plea only that "(t)he defendant (Hampshire) will be jointly and separately liable with the corporation for the forfeiture of the $2 million that has been previously mentioned". CR Vol. 7 at 16.

Despite the fact that the Petitioner and the Government specifically agreed that the <u>total</u> amount of fine and forfeiture would not exceed two million dollars, and despite the fact that the District Court unequivocally told the parties he was accepting the plea agreement which provided for a two million dollar forfeiture, the Court proceeded to impose a

"fine" of $22,054.80 on Petitioner to cover the costs of incarceration. The District Court's action in this regard constitutes reversible error on three separate grounds. First, the imposition of this fine is violative of the plea agreement entered into by the Petitioner and the government. Secondly, the court had no jurisdiction to impose a cost of incarceration fine in the absence of first imposing a punitive fine. United States v. Norman, __F.2d____ (11th Cir. No. 91-3088, Sept. 30, 1993). And finally, the imposition of a fine to cover the costs of incarceration is unconstitutional denial of due process. United States v. Spiropoulos, 976 F.2d 155 (3d Cir. 1992).

REASONS FOR GRANTING THE WRIT

By claiming waiver with a stroke of the pen the Eleventh Circuit avoided the need to censure the district judge who denied Petitioner Fifth Amendment Due Process by contacting the Attorney

General in an ex parte letter before imposing the maximum sentence possible under the terms of a plea agreement. Indeed, the district court exceeded the terms of the plea agreement by imposing costs of imprisonment when such costs are not authorized under the Sentencing Guidelines in the absence of a punitive fine.

The issues presented here although not stemming from a published opinion, merit publication to set the limits on ex parte contact by the sentencing judge and to address the issue of imposition of costs of imprisonment as an unauthorized fine in the absence of a punitive fine.

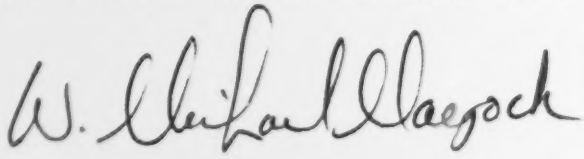
CONCLUSION

For the reasons cited above it is respectfully submitted that a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Dated: July 1, 1994.

Respectfully submitted,

LAW OFFICES OF W. MICHAEL MAYOCK



By: W. MICHAEL MAYOCK
Attorney for Petitioner,
Russell Hampshire

APPENDIX A

No. 92-6848

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Russell Hampshire,
Defendant-Appellant.

D.C. No. CR 91-00200-RV

Appeal from the United States District court
for the Southern District of Alabama

February 4, 1994

Before: ANDERSON and BIRCH, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

---

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Although the district court gave appellant ample opportunity to object as required by the law of this circuit, defendant raised none of the challenges he now seeks to raise for the first time on appeal. Accordingly, appellants claims are waived and the judgment of the district court is

AFFIRMED.

APPENDIX B

No. 92-6848

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Russell Hampshire,
Defendant-Appellant.

D.C. No. CR 91-00200-RV

Appeal from the United States District court
for the Southern District of Alabama

April 6, 1994

Before: ANDERSON and BIRCH, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

---

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are

DENIED.

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No. 94-115

In the Supreme Court of the United States

OCTOBER TERM, 1994

RUSSELL HAMPSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in sentencing petitioner to a term of supervised release and imposing a fine to cover the cost of his imprisonment and supervised release.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-115

RUSSELL HAMPSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 15 F.3d 1096 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1994. A petition for rehearing was denied on April 6, 1994. Pet. App. B1-B2. The petition for a writ of certiorari was filed on July 6, 1994, and is therefore out of time pursuant to Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Alabama, petitioner was convicted on two counts of causing the interstate transportation of obscene material by common carrier, in violation of 18 U.S.C. 1462. He was sentenced to 12 months' imprisonment, to be followed by a three-year term of supervised release. In addition, he was ordered to pay the cost of his incarceration and supervised release. The court of appeals affirmed. Pet. App. A2.

1. Petitioner was the president and sole stockholder of co-defendant VCA Labs, Inc. From mid-1989 to early 1990, VCA shipped at least 18 sexually explicit video cassettes from California to the Southern District of Alabama. Petitioner and VCA were indicted on three counts of causing the interstate transportation of sexually explicit material by common carrier and one count of conspiring to commit that offense. The indictment also sought the forfeiture of certain assets as proceeds of the above offenses.

The parties thereafter entered into a written plea agreement. The agreement stated that petitioner would plead guilty to two of the substantive counts in the indictment and would provide the government with information about the adult obscenity industry. Plea Agreement ¶¶ 1, 5. In return, the government undertook to dismiss the remaining counts, not to prosecute petitioner for certain uncharged offenses, and to recommend a downward departure to a term of 12 months' imprisonment, pursuant to Sentencing Guidelines § 5K1.1, if petitioner provided the cooperation contemplated by the agreement. Plea Agreement ¶¶ 3-4, 12. The agreement stated that petitioner understood

that he was subject to a maximum penalty of five years' imprisonment and a fine of $250,000 on each count to which he pleaded guilty. *Id.* ¶ 1.

Under the plea agreement, co-defendant VCA agreed to plead guilty to all the counts of the indictment and to "pay forfeiture in the amount of $2 million." Plea Agreement ¶ 7. VCA also agreed to plead guilty to obscenity offenses in two other federal district courts. The agreement stated that "it is the intent for the cumulative forfeiture amount [in all districts] to be two million dollars with no fine" and that "[a]s part of those pleas the Government agrees not to request any fine." *Id.* ¶ 10. The agreement added that "[t]his agreement shall be null and void if the agreed terms are not adopted by all the district courts and the parties will be permitted to withdraw all pleas previously entered." *Ibid.*[1]

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[1] Paragraph 10 of the Plea Agreement provided in full:

> VCA Labs, Inc., further agrees to enter corporate pleas of guilty to transportation of obscene materials in violation of Title 18 U.S.C. §1462 in the Northern District of Oklahoma and a second district whose identity will be revealed upon acceptance of the instant plea. As part of those pleas the Government agrees not to request any fine. Further, the United States Attorney for the unnamed district agrees to request forfeiture in an amount not to exceed $500,000.00 which shall be taken from the $2 million dollars forfeited to the United States Attorney for the Southern District of Alabama pursuant to the instant plea.
>
> The pleas in these two districts will be accomplished by Rule 20 if possible but if pleas are required before district judges in the respective districts, the parties agree that it is the intent for the cumulative forfeiture amount to be two million dollars with no fine. This agreement shall be null and void if the agreed terms are not adopted by all the district courts and the parties will be permitted to withdraw all pleas previously entered.

2. The presentence report stated that the applicable penalties for petitioner's offenses under the Sentencing Guidelines were a prison term of 27 to 33 months, a supervised release term of not more than three years, and a fine of between $5,000 and $50,000. Presentence Report ¶¶ 33-35, 60. The report added that "[s]ubject to the defendant's ability to pay, the Court shall impose an additional amount that is at least sufficient to pay the cost to the Government of any imprisonment, probation or supervised release ordered. [Guidelines] § 5E1.2(i)."[2] *Id.* ¶ 61. The report concluded that, based on petitioner's reported net worth of over $400,000 and monthly net income of approximately $6,000 derived from his pornography business, he was able to pay a cost-of-imprisonment fine. *Id.* ¶¶ 64-65.

3. Prior to the imposition of sentence, the prosecution informed the district court *in camera* that it would recommend that petitioner receive a downward departure to 12 months' imprisonment for his substantial assistance to the government. 9/11/92 Tr. 3. When the defense informed the court that it would be seeking an additional downward departure, the court indicated that it was not inclined to depart further. Although the court agreed to follow the plea agreement, it expressed disappointment with the government for settling the case on what it regarded as excessively lenient terms.

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[2] Sentencing Guidelines § 5E1.2(i) provides that "[n]otwithstanding the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered." Subsection (c) of the Guideline consists of the Fine Table for calculating the applicable amount of a "punitive" fine. Subsection (f) makes the imposition of any fine contingent on the defendant's ability to pay.

Id. at 4. The court stated that it had recently sentenced a defendant to ten years' imprisonment "for being the girlfriend of someone who distributed cocaine," and that, in its view, "the production of obscene material is as bad as the production of cocaine." *Id.* at 5. The court added that it had "a very bad attitude toward [obscene material]." *Ibid.* The court informed the parties that it had sent a letter to the Attorney General expressing regret at having followed the government's sentencing recommendation and stating that it would never approve such a settlement again. *Id.* at 6.

At sentencing, the district court accepted the government's recommendation for a downward departure to 12 months' imprisonment, and imposed a three-year term of supervised release. The court also fined petitioner $22,054.80 pursuant to Guidelines § 5E1.2(i) to cover the cost of his imprisonment and supervised release. C.A. E.R., Tab 4, at 2-3. When the court informed the defense counsel following the imposition of sentence that, if he had any objections to the sentence, he "should articulate those grounds at this time or they will be waived on appeal," counsel objected only to the court's failure to depart below 12 months. 9/11/92 Tr. 46.

4. On appeal, petitioner contended that the district court erred in imposing a term of supervised release and a fine to cover the cost of his incarceration. In a brief *per curiam* opinion, the court of appeals held that petitioner had waived his claims. The court explained: "Although the district court gave [petitioner] ample opportunity to object as required by the law of this circuit, [petitioner] raised none of the challenges he now seeks to raise for the first time on appeal." The court did not address petitioner's claims on the merits. Pet. App. A2.

ARGUMENT

Petitioner contends that the district court erred in sentencing him to a term of supervised release and in imposing a fine to cover the cost of his imprisonment and supervised release. Specifically, he argues that imposition of the supervised-release term and the fine was inconsistent with his plea agreement; that the district court lacked jurisdiction to impose a cost-of-incarceration fine without first imposing a "punitive" fine; and that the imposition of a fine to cover the cost of incarceration is unconstitutional.

1. As the court of appeals held, petitioner waived his challenges to his sentence by failing to raise them at sentencing. After imposing sentence, the district court specifically invited petitioner to raise any objections to his sentence. Petitioner's only complaint was directed to the court's refusal to depart downward below 12 months; he said nothing about the term of supervised release or the fine. It is well settled that the failure to raise a challenge to a sentence in the district court waives the claim. See, *e.g.*, *United States* v. *Johnson*, 952 F.2d 565, 585 (1st Cir. 1991), cert. denied, 113 S. Ct. 58 (1992); *United States* v. *Villegas*, 911 F.2d 623, 632 (11th Cir. 1990), cert. denied, 499 U.S. 977 (1991).

With respect to most of his claims, petitioner offers no basis to conclude that they were preserved in the face of his clear waiver at the sentencing hearing. As to his claim that the plea agreement precluded imposition of a fine, however, petitioner argues that he preserved that claim in his Memorandum of Points and Authorities with respect to Sentencing Factors (Def.'s Sentencing Mem.), which he filed with the district court prior to sentencing. He relies on a single sentence in that document, which stated: "With respect to the Plea

Agreement, it is understood that this plea was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(c) and that there is to be no fine for the defendant only a cumulative fine of $2,000,000 for the corporation, VCA Labs, Inc." Def.'s Sentencing Mem. 7. Absent any suggestion at the sentencing proceeding itself that petitioner took issue with the imposition of the fine, the court of appeals properly declined to regard that statement as an objection sufficient to preserve his challenge to the fine.

2. In any event, petitioner's various claims do not warrant further review.

a. Petitioner argues (Pet. 4, 15) that the plea agreement precluded imposition of a fine. The plea agreement specifically provided that the maximum penalty to which petitioner was subject included "a fine of $250,000." Plea Agreement ¶ 1. The district court properly construed that language to permit at least a $22,000 cost-of-imprisonment fine.

Contrary to petitioner's contention, the district court's construction of the plea agreement is consistent with paragraph 10 of the Plea Agreement. Paragraph 10 of the Plea Agreement provided that "the parties agree that it is the intent for the cumulative forfeiture amount [in all district courts] to be two million dollars *with no fine*" (emphasis added). See note 1, *supra*. But paragraph 10 was concerned solely with the disposition of the charges against co-defendant VCA Labs—not the charges against petitioner—and the consequences of VCA's guilty pleas in other districts. Paragraph 10 began with a statement that VCA "further agrees to enter corporate pleas of guilty" in various districts, and that "[a]s part of those pleas the Government agrees not to request any fine." Nothing in paragraph 10 addressed the sentence to be imposed on petitioner. In any event,

further review to determine whether the district court properly construed the particular terms of the plea agreement in this case would be unwarranted.

b. Petitioner also appears to argue that the court of appeals should not have found a waiver because the district court's imposition of the fine and term of supervised release was the product of bias. Any bias on the district court's part in imposing sentence, however, has no logical bearing on the question whether the court of appeals correctly determined that petitioner waived the present challenges to his sentence. In addition, petitioner waived his claim of judicial bias by failing to raise it in the district court.

In any event, there are no grounds for concluding that the district court was biased. In support of the allegation, petitioner relies on statements by the court at the *in camera* hearing revealing the court's belief that obscenity offenders should be sentenced harshly, and on the letter the court sent to the Attorney General. Different judges, however, bring different sentencing philosophies to bear on the sentencing decision. The fact that some judges would impose harsher sentences for certain offenses than would other judges, within the limits prescribed by the pertinent statutes and Guidelines, does not establish bias. See, *e.g.*, *United States* v. *Guglielmi*, 615 F. Supp. 1506, 1511 (W.D.N.C. 1985), aff'd, 819 F.2d 451 (4th Cir. 1987), cert. denied, 484 U.S. 1019 (1988); *Markus* v. *United States*, 545 F. Supp. 998, 1000 (S.D.N.Y. 1982), aff'd, 742 F.2d 1444 (2d Cir. 1983) (Table). Nor did the court's letter to the Attorney General questioning the wisdom of the plea agreement suggest that the court was biased. The court in fact approved the agreement and determined to comply with it in imposing sentence. The fact that the court developed

strong views concerning the wisdom of the agreement does not suggest bias.

c. As petitioner suggests, there is a conflict among the circuits on the question whether the Sentencing Guidelines authorize a cost-of-incarceration fine without a separate "punitive" fine. Compare *United States* v. *Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994), and *United States* v. *Turner*, 998 F.2d 534 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993) (no punitive fine required as prerequisite for cost-of-incarceration fine) with *United States* v. *Norman*, 3 F.3d 368 (11th Cir. 1993), cert. denied, 114 S. Ct. 1102 (1994); *United States* v. *Fair*, 979 F.2d 1037 (5th Cir. 1992); *United States* v. *Corral*, 964 F.2d 83 (1st Cir. 1992); and *United States* v. *Labat*, 915 F.2d 603, 607 (10th Cir. 1990) ("punitive" fine is required). The conflict, however, centers on the interpretation of Sentencing Guidelines § 5E1.2(i), and therefore can be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991). In any event, the issue has little practical significance, for even if a separate punitive fine were required, the district court had authority to impose a punitive fine of $1 and then a cost-of-incarceration fine in the same amount as the one it actually imposed. See *Turner*, 998 F.2d at 538.

d. Petitioner also states (Pet. 16) that the Guidelines provision governing cost-of-incarceration fines is unconstitutional. In *United States* v. *Spiropoulos*, 976 F.2d 155 (3d Cir. 1992), the case cited by petitioner for that proposition, the court did not base its decision on constitutional grounds. Instead, the court held that the Guidelines provision authorizing a cost-of-imprisonment fine was invalid because the Sentencing Reform Act, pursuant to which it was promulgated, does not authorize the assessment of a fine to pay the cost of a

defendant's imprisonment. 976 F.2d at 165. Petitioner does not raise that statutory issue in his petition, and other courts have rejected constitutional challenges to Section 5E1.2(i). *United States* v. *Hagmann*, 950 F.2d 175, 186-187 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992); *United States* v. *Doyan*, 909 F.2d 412 (10th Cir. 1990).

e. Finally, there is no merit to petitioner's claim that the imposition of a term of supervised release violated the plea agreement. Although the plea agreement did not specifically address the question whether a term of supervised release would be included in petitioner's sentence, it stated that petitioner was subject to a maximum sentence of five years. The one-year prison term and three-year term of supervised release petitioner received were cumulatively well within that range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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